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RELIGIOUS LIBERTY IN THE AMERICAN LAW.

I.

WHEN the convention which framed the federal constitution assembled in Philadelphia in 1787 religious tests as a qualification for office were actually a part of the constitutions of most of the thirteen original states.¹ While Massachusetts² and Maryland³ required from certain state officers only a declaration of a belief in the Christian religion, the fundamental law of Georgia, New Hampshire, New Jersey and North Carolina⁴ limited such belief to the Protestant religion⁵ and was designed to require a positive and affirmative test and not merely the negative qualification of not being a Roman Catholic.⁶ The Delaware, North Carolina and Pennsylvania constitutions⁷ further required an acknowledgment that both the old and new testaments are given by divine inspiration.⁸ The constitution of Pennsylvania in addition exacted a confession of a belief "in one God, the creator and governor of the Universe the rewarder of the good and the punisher of the wicked,"⁹ while the Delaware fundamental law imposed a veritable confession of faith professing "faith in God the Father, and in Jesus Christ his only son, and in the Holy

¹ 1886 *Hale v. Everett*, 53 N. H. 9, 112; 16 Am. Rep. 82.

² Massachusetts Const., Ch. 6, Art. 1. The declaration required was: "I believe the Christian religion and have a firm persuasion of its truth."

³ Maryland Const. of 1776 Declaration of Rights, Art. 35.

⁴ Georgia Const. of 1777, Art. 6; New Hampshire Const. of 1784, Part 2, Subtitle House of Representatives; New Jersey Const. of 1776, Art. 19; North Carolina Const. of 1776, Art. 32.

⁵ For Vermont which was then already asking for admission. See its constitutions of 1777, Ch. 2, Sec. 9, and of 1786, Ch. 2, Sec. 12.

⁶ 1868 *Hale v. Everett*, 53 N. H. 9; 16 Am. Rep. 82.

⁷ Delaware Const. of 1776, Article 22; North Carolina Const. of 1776, Art. 32; Pennsylvania Const. of 1776, Sec. 10.

⁸ For Vermont see its constitution of 1777, Ch. 2, Sec. 9, and of 1786, Ch. 2, Sec. 12.

⁹ Pennsylvania Const. of 1776, Sec. 10. Vermont had the same requirement.

Ghost, one God blessed for ever more."¹⁰ The practical difficulties in the way of formulating a federal religious test satisfactory to the various states under these circumstances were overwhelming. The diversity in the religious faiths then still established in many of the states precluded any harmonious action looking to such a test. The staunch little state of Rhode Island the only one of the original thirteen states which had never had a religious establishment or religious test would never have joined the union if such a test had been imposed. Devout religionists and violent anti-religionists in the convention therefore joined their forces in opposing such a test and pointed out the extreme dangers and difficulties of attempts to connect the civil powers with religious opinions and to exclude dissenters from participation in the public honors, trusts, emoluments, privileges and immunities. The result was not merely negative but distinctly positive. Not only was no federal religious test adopted but a provision was incorporated into the federal constitution to the effect that "no religious test shall ever be required as a qualification to any office or public trust under the United States."¹¹

It is too clear for argument that this provision does not by its letter or spirit forbid religious tests on the part of the various states. The existing provisions on this matter in the various states were therefore not invalidated by it and the adoption of new provisions by such states was not thereby prohibited. While it has had a potent influence on the various states and has been more or less literally copied into most of the existing state constitutions¹² it should not be overlooked that remnants of such tests still linger in a number of them. Accordingly the constitutions of Arkansas, Maryland, Mississippi, North Carolina, Pennsylvania, South Carolina, Tennessee and Texas¹³ still require the bare acknowledgment or the lack of a denial of the existence of a Supreme Being as a test for certain offices, while Pennsylvania and Tennessee in addition exact a belief in a future state of rewards and punishments.¹⁴ It is curious to note that such provision in the case of Mississippi and Tennessee very inconsistently is linked with another provision which forbids all religious tests and that in the case of Texas and

¹⁰ Delaware Const. of 1776, Art. 22.

¹¹ United States Const., Art. 6, Sec. 3.

¹² See the religious freedom clauses in the various constitutions.

¹³ Arkansas Const. of 1874, Art. 19, Sec. 1; Maryland Const. of 1867, Declaration of Rights, Art. 37; Mississippi Const. of 1890, Sec. 265; North Carolina Const. of 1876, Art. 6, Par. 8; Pennsylvania Const. of 1873, Art. 1, Sec. 4; South Carolina Const. of 1895, Art. 17, Sec. 4; Tennessee Const. of 1870, Art. 9, Sec. 2; Texas Const. of 1876, Art. 1, Sec. 4.

¹⁴ Pennsylvania Const. of 1873, Art. 1, Sec. 4; Tennessee Const. of 1870, Art. 9, Sec. 2.

Maryland it takes the form of an exception from an otherwise absolute prohibition of religious tests.¹⁵ It requires no prophetic vision to predict that these last faint remnants of an outworn condition of affairs will eventually be eliminated so that no person will on account of his religious belief or disbelief be legally disqualified from holding any public office, employment or position of trust of any kind within the United States.

The federal constitution as submitted to the states by the convention was not very satisfactory to most of the individual states. The chief objection to it was that it contained no bill of rights. Accordingly numerous amendments to it were proposed and of these ten were adopted practically simultaneously with the constitution itself. The provision in regard to religious tests in particular was felt to be insufficient. Perpetual strife and jealousy on the subject of ecclesiastical ascendancy was anticipated shaking the newly founded union to its foundations, if the national government was left free to create a national religious establishment. Complete religious liberty to all persons, and the absolute separation of the church from the state, by the prohibition of any preference by federal law in favor of any religious persuasion or mode of worship was generally desired. Accordingly the friends of religious liberty composed of freethinkers on the one side and earnest believers on the other pointed out the dangers to the national government from ecclesiastical ambition, the intolerance of sects and the bigotry of spiritual pride, and reinforced their arguments by showing the practical impossibility of selecting a national state church from among the various denominational bodies willing to be considered for the honor. The very fact that most of the thirteen states then either had established churches or were favoring some one denomination and were unwilling to concede any favor by the federal government to any sect but their own made the last argument a very pointed one. The result was the adoption of the famous first amendment which provides that "congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."¹⁶

The purpose of this amendment cannot be in doubt. Its object is not to countenance, much less to advance, Mohammedanism or Judaism or infidelity by prostrating Christianity but to exclude all rivalry among denominations and to prevent any national ecclesi-

¹⁵ Mississippi Const. of 1890, Sec. 18; Tennessee Const. of 1870, Art. 1, Sec. 4; Texas Const. of 1876, Art. 1, Sec. 4; Maryland Const. of 1867, Declaration of Rights, Art. 37.

¹⁶ United States Const. First amendment.

astical establishment which would give to any hierarchy the exclusive patronage of the national government. It gives to religious liberty the character of a political right,¹⁷ is intended "to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose, as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship, as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets or the modes of worship of any sect,"¹⁸ and means exactly what it says and no more. It is a restraint on the action of *Congress* and is not a restriction on the powers of the various *State Legislatures*. "The constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws; nor is there any inhibition imposed by the constitution of the United States in this respect on the States."¹⁹ Any action taken by a state establishing some religion and prohibiting the free exercise of all other religions would therefore not be in contravention of it. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."²⁰

It does not however follow that the various states are now free to do as they please in the matter. A federal "compact" has been imposed by Congress on all the new states admitted into the union since the days of the Civil War which effectually prevents radical action in the direction of establishing any church. The Civil War issues had been clarified but the thirteenth amendment had not been adopted when Nebraska and Nevada knocked at the doors of Congress and asked to be admitted into the Union. This request received favorable consideration but was somewhat more encumbered with conditions than had heretofore been customary. The new states were required to agree that neither slavery nor involuntary servitude be tolerated within their borders except as a punishment for crime. Due probably to the fear that the Mormon church so powerful in the West might stamp out religious liberty in the new states, the policy was now adopted of requiring the conventions called to formulate the constitutions of the new states to provide by an ordinance irrevocable, without the consent of the United States

¹⁷ 1845, *Permodi v. First Municipality*, 44 U. S. (3 How.) 589, 610; 11 L. Ed. 739, cited in 1867, *Murphy and Glover Test Oath Cases*, 41 Mo. 339, 367.

¹⁸ 1880, *Davis v. Beason*, 133 U. S. 333, 342; 33 L. Ed. 637; 10 Sup. Ct. Rep. 299.

¹⁹ 1845, *Permodi v. First Municipality*, 44 U. S. (3 How.) 589, 609; 11 L. Ed. 739.

²⁰ United States Const. Tenth amendment.

and the people of the new state that "perfect toleration of religious sentiment shall be secured, and no inhabitant of said State shall ever be molested in person or property on account of his or her mode of religious worship."²¹ Accordingly nine western states (Arizona, Idaho, Nevada, New Mexico, North Dakota, South Dakota, Utah, Washington, and Wyoming) have incorporated such an ordinance into their constitutions recapitulating the requirements of their enabling statutes and reciting that such ordinance shall not be changed or abrogated in whole or part by any future constitutional amendment without the consent of Congress.²² In addition to these states, Colorado, Montana and Oklahoma have accepted the ordinance by an independent document attached to their constitutions while in the case of Nebraska the condition apparently has been lost sight of or has been disregarded. Under this compact religious liberty in almost all the far western states is secured against any adverse state action.

It has already been seen that the federal constitution as originally adopted and amended did not restrain any state action in regard to religious matters. The civil war produced a change also in this respect. In consequence of it the provision of the Fifth Amendment which prevents the *United States* from depriving any person "of life, liberty or property without due process of law," was extended by the Fourteenth Amendment to cover the *various states*, effectually prevents "hostile and discriminating legislation by a state against persons of any class, sect, creed or nation, in whatever form it may be expressed"²³ and does not even stop with the protection of individuals but, on the contrary, guards the property of all the various church bodies from spoliation by the states. Confiscation of such property such as has taken place in Europe whenever one church was disestablished to make room for another is therefore now impossible in America. The security thus provided is enhanced by the provision of the federal constitution which prohibits the states from impairing the obligation of contracts as this provision has been interpreted by the United States Supreme Court in the famous *Dartmouth College* case.²⁴ There is therefore now no country in which not only religious liberty in general but the

²¹ See the various enabling statutes of the states mentioned *infra*.

²² Arizona Const. of 1912, Art. 20; Idaho Const. of 1889, Art. 21, Sec. 19; Nevada Const. of 1864, "Preliminary Action"; New Mexico Const. of 1912, Art. 21, Sec. 1; North Dakota Const. of 1889, Art. 16, Sec. 203; South Dakota Const. of 1889, Art. 22; Utah Const. of 1895, Art. 3; Washington Const. of 1889, Art. 26; Wyoming Const. of 1889, Art. 21, Ordinance.

²³ Field, Circuit Justice in 1879, *Ho Ah Kow v. Nunan*, Fed. Cas. No. 6546, page 265; 5 Sawyer 552, 562.

²⁴ 1819, *Dartmouth College v. Woodward*, 17 U. S. (4 Wheat.) 518; 4 L. Ed. 629.

property of religious bodies in particular is as secure as it is in the United States.

It would seem that the provisions of the federal constitution are ample enough to fully protect those parts of the United States which have not as yet achieved statehood rights. Be that as it may the matter has not been left to mere constitutional guarantees but has been reinforced (if that is possible) by provisions inserted in the various treaties by which these territories were acquired. Provisions of this nature inserted in the Louisiana Purchase treaty and in the treaty which terminated our war with Mexico are interesting historically but have ceased to be of legal interest because all the territory acquired by these treaties has now been incorporated in the various states that have been carved out of it.^{24a} The provisions of the treaties by which Alaska and our insular possessions were acquired from Russia, Spain and Denmark however are still in force and therefore deserve to be cited in full. In the treaty of 1867 with Russia it was expressly "understood and agreed, that the churches which have been built in the ceded territories by the Russian government, shall remain the property of such members of the Greek Oriental Church resident in the territory as may choose to worship therein," while the United States obligated itself to maintain and protect such inhabitants as should remain in Alaska "in the free enjoyment of their liberty, property and religion."^{24b} In the treaty of Paris which terminated our war with Spain it was declared that the relinquishment or session of Cuba, the Phillipine Islands etc. "cannot in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds of * * * ecclesiastical or civil bodies," while it was further declared that "the inhabitants of the territory over which Spain relinquishes or cedes her sovereignty shall be secured in the free exercise of their religion."^{24d} Finally in the Treaty of Jan. 17th, 1917 by which Denmark ceded the Danish West Indies to the United States it was provided that "Danish citizens residing in said islands * * * in case they remain in the islands * * * shall continue, until otherwise provided, to enjoy all the * * * religious rights and liberties secured to them by the laws now in force. If the present laws are altered, the said inhabitants shall not thereby be placed in a less favorable position in respect to the above mentioned rights and liberties than they now enjoy."^{24e}

^{24a} Art. 3, Treaty of 1803 with France; Art. 9, Treaty of 1848 with Mexico.

^{24b} Art. 2 and 3, 15 U. S. Sta. at Large 539.

^{24d} Art. 8, Treaty of Paris, 30 U. S. Sta. at Large 1758.

^{24e} Art. 6, 39 U. S. Sta. at Large 1711.

The federal compact above considered covers only the states admitted into the Union since 1860 and has therefore no application to Texas, Kansas, California, and Oregon and to the States east of or bordering on the Mississippi river. The Fourteenth Amendment is very much restricted in its scope merely forbidding the various states from unlawfully interfering with the life, liberty or property of any person. The treaty provisions above cited are applicable only to our territorial possessions. The questions concerning religious liberty in the great majority of the cases must therefore be solved by referring to the provisions of the various state constitutions and to the statutes passed under them. These throughout our history as a nation have varied considerably. Not a few of the original states actually retained their established religion for a longer or shorter period after the adoption of the federal constitution. Connecticut did not achieve full religious liberty till 1818 when it adopted a new constitution.²⁵ Massachusetts grimly held on to its Congregational establishment until 1833 when the fact that its state churches had largely become Unitarian brought about the religious freedom amendment to the venerable document adopted in 1780 which still serves the Bay state as a constitution.²⁶ In Texas the Catholic religion was originally established and was by the constitution of 1845 reduced "from the high privilege of being the only national church, to a level and an equality with every other denomination."²⁷ In New Hampshire under a constitutional provision adopted in 1784, readopted successively in 1792, 1802 and 1812 and in force today, express power is conferred on the legislature to authorize the several towns in the state "to make adequate provision, at their own expense, for the support and maintenance of public Protestant teachers of piety, religion and morality."²⁸ Of the other states, Missouri²⁹ still puts severe restrictions on religious corporations while Virginia and West Virginia³⁰ interdict them completely. Other states still retain some form of a religious test.³¹ On the whole, however, it must be said that religious liberty has obtained a complete triumph and that what still remains of the old order of things does not ordinarily work any hardship.

²⁵ Connecticut Const. of 1818, Art. 1, Sec. 3, 4; Art. 7, Sec. 1, 2.

²⁶ Massachusetts Const. Eleventh amendment. See 1833 *Commonwealth v. Kneeland*, Thatchers Cr. Cas. 346, 384. Affirmed 37 Mass. 206.

²⁷ 1848, *Blair v. Odin*, 3 Tex. 288, 300.

²⁸ New Hampshire Const. of 1812, Part 1, Art. 6. It need hardly be pointed out that the legislature for something like a century has not exercised this power.

²⁹ Missouri Const. of 1875, Art. 2, Sec. 8. See pp. — of this chapter.

³⁰ Virginia Const. of 1802, Art. 4, Sec. 59; West Virginia Const. of 1872, Art. 6, Sec. 47.

³¹ See notes 13, 14, 15 supra.

The importance of these state provisions cannot easily be overstated. They prevent adverse action by the state legislature in a sphere very much wider from the viewpoint of the individual citizen than that to which the provisions of the federal constitution have reference. They all more or less clearly recognize the fact that an established religion, a union of state and church, like a mismated marriage is detrimental to both parties as it inevitably makes the state despotic and the church hypocritical. While many of the subordinate clauses of these provisions are alike and frequently even identical, great originality has been used by the framers of the various constitutions in putting them together. No two such provisions in consequence are identical in language. They all, however, have the same purpose. Their keynote has been appropriately sounded by Virginia, the mother of presidents, and by Rhode Island, the only one of the original states which never had a religious test or a religious establishment, by declaring that the duty which man owes to God and the manner of discharging it can be directed only by reason and conviction not by force or violence,³² that God has created the mind free, that all attempts to influence it by temporal punishments or burdens or by civil incapacities tend to beget habits of hypocrisy and meanness, and that one of the principal objects of the early settlers was to hold forth a lively experiment that a flourishing civil state may stand and be best maintained with full liberty in religious concerns.³³

Turning now to the various provisions, their great variations in the matter of phraseology makes any compilation of them within a reasonable compass impossible. All that can be done is to classify the various clauses and state their main contents. Not very many state constitutions prohibit an establishment of religion in the very words used by the first amendment to the federal constitution.³⁴ Though it is a commonplace in our jurisprudence that "under our form of government, church and state are not and never can be united,"³⁵ only the Utah constitution in terms forbids a "union of church and state."³⁶ Instead, general declarations are made to the

³² Virginia Const. of 1902, Art. 1, Sec. 16.

³³ Rhode Island Const. of 1842, Art. 1, Sec. 3.

³⁴ This provision is literally copied into the Const. of Iowa of 1857, Art. 1, Sec. 3; into the Const. of South Carolina of 1895, Art. 1, Sec. 4; and into the Const. of Utah of 1895, Art. 1, Sec. 4. It has been partially copied into the constitutions of Alabama of 1901, Art. 1, Sec. 3; Louisiana of 1913, Art. 4, and New Jersey of 1844, Art. 1, Sec. 4.

³⁵ 1888, *Cook County v. Industrial School for Girls*, 125 Ill. 540, 562; 18 N. E. 183; 8 Am. St. Rep. 386; 1 L. R. A. 437.

³⁶ Utah Const. of 1895, Art. 1, Sec. 4.

effect that every individual has by nature the inherent, inalienable³⁷ and indefeasible right of worshipping and serving God in the mode most consistent with the dictates of his conscience, that none shall be deprived of this right, that no human authority shall in any case interfere with or in any manner control or infringe it, and that the free exercise and enjoyment of religious faith, worship, belief, sentiment, and profession shall forever be allowed, secured, protected, guaranteed and held sacred. It follows that every person is at liberty to profess and by argument to maintain his opinion in matters of religion,³⁸ that every denomination is protected in the peaceable enjoyment of its own mode of religious worship,³⁹ that none will be subordinated to any other⁴⁰ or receive any peculiar privileges or advantages,⁴¹ in short, that no preference will be given to nor discrimination made against any religious establishment, church, sect, creed, society or denomination or any form of religious faith or worship or system of ecclesiastical policy.⁴² Any civil or political rights, privileges, capacities, or positions which a person may have or hold will not be diminished or enlarged or in any other manner affected thereby, nor will he be disqualified from the performance of his public or private duties on account thereof. He will not on account of his religious opinion, persuasion, profession and sentiments or the peculiar mode or manner of his religious worship be hurt, molested, disturbed, restrained, burdened or made to suffer in his person or property.

The greatest grievance against the established churches as they existed at and before the time of the adoption of the federal constitution was the fact that taxes were levied and enforced to support them. In consequence the constitutions of two states prohibit the legislature from passing "any law requiring or authorizing any religious society or the people of any district within this state, to levy on themselves or others any tax for the erection or repair of any house of public worship or for the support of any church or min-

³⁷ This word is explained by the New Hampshire Const. of 1912, Part 1, Art. 4, as follows: "Among the natural rights, some are in their very nature inalienable, because no equivalent can be given or received for them. Of this kind are the rights of conscience."

³⁸ Rhode Island Const. of 1842, Art. 1, Sec. 3; Virginia Const. of 1902, Art. 4, Sec. 58; West Virginia Const. of 1872, Art. 3, Sec. 15.

³⁹ Arkansas Const. of 1874, Art. 2, Sec. 25; Nebraska Const. of 1875, Art. 1, Sec. 4; Ohio Const. of 1851 and 1912, Art. 1, Sec. 7; Texas Const. of 1876, Art. 1, Sec. 6. See also the Vermont Const. of 1793 and 1913, Art. 64.

⁴⁰ Maine Const. of 1819, Art. 1, Sec. 3; Massachusetts Const., eleventh amendment.

⁴¹ Virginia Const. of 1902, Art. 4, Sec. 58; West Virginia Const. of 1872, Art. 3, Sec. 15.

⁴² See 1874, *Shreveport v. Levy*, 26 La. Ann. 671.

istry."⁴³ This does not of course mean that individuals cannot enter into an agreement to pay such charges. The very articles from which the above is taken, therefore, conclude with the words: "it shall be left free to every person to select his religious instructor, and to make for his support such private contract as he shall please." The whole situation is well summed up in the following words of the New Jersey constitution: "Nor shall any person be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches, place or places or worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberately and voluntarily engaged to perform."⁴⁴ Accordingly contract relations for the support of religion are recognized both expressly⁴⁵ and by providing that no person shall be compelled to contribute *against his consent* to the erection or repair of any place of religious worship or to pay tithes or other rates for the support or maintenance of any ministry or any priest, minister, preacher or teacher of any sect, creed or denomination of religion.

The attempts made in the early colonial times to force all inhabitants to attend religious worship are well known to all who have even a superficial knowledge of our early history. It is not such a matter of general knowledge that the constitution of Massachusetts, adopted in 1780, four years after the declaration of independence, expressly conferred upon the Massachusetts legislature the power to enjoin upon all the subjects of the commonwealth an attendance upon the instructions of the public teachers at stated times and seasons if there were any upon whose instructions they could conscientiously and conveniently attend.⁴⁶ The existence of such and similar provisions in the early statutes and constitutions of a number of the thirteen original states has been instrumental in bringing into the various constitutions a provision to the effect that no one shall under any pretense whatever be required or compelled to attend or frequent any place, form or system of religious worship.

Taking these provisions of the state and federal constitutions together it cannot admit of any doubt that the American citizen enjoys the fullest protection of his religious liberty which human

⁴³ Virginia Const. of 1902, Art. 4, Sec. 58; West Virginia Const. of 1872, Art. 3, Sec. 15.

⁴⁴ New Jersey Const. of 1844, Art. 1, Sec. 3.

⁴⁵ Maryland Const. of 1867, Declaration of Rights, Art. 36; Massachusetts Const., eleventh amendment; Rhode Island Const. of 1842, Art. 1, Sec. 3; New Hampshire Const. of 1912, Part 1, Art. 6.

⁴⁶ Massachusetts Const., Part 1, Art. 3.

ingenuity can devise. Neither the federal nor the state constitutions erect dogmatic fortresses to awe him or plant theological batteries to cow him. They merely protect him in his dual capacity as a citizen of the United States and as a citizen of the state of his residence. The provisions of the federal constitution shield him from any adverse action by Congress and to a limited extent from adverse action by the state of his residence, while the provisions of his state constitution, which in some cases have taken the form of a federal compact, protect him from a similar outrage on the part of his state legislature. He is thus fully protected to the extent of the two constitutions under which he lives.

The term religious liberty, however, must not be misunderstood. Obviously the definition of this term which any individual may have adopted will not necessarily be correct. It must not be supposed that everything which anyone may classify as part of his religious freedom will be protected. Religious liberty does not include "the right to introduce and carry out every scheme or purpose which persons see fit to claim as part of their religious system."⁴⁷ It would be subversive of good government to subordinate the power of restraining acts prejudicial to the public welfare and productive of social injury to the convictions of each individual.⁴⁸ "The religious doctrine or belief of a person cannot be recognized or accepted as a justification or excuse for his committing an act which is a criminal offense under the law of the land."⁴⁹ It is therefore provided in a majority of the state constitutions that liberty of conscience shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace, safety and good order of the state. It follows that a conscientious belief furnishes no legal defense where a person has done or has refused to do what the government within its constitutional authority has required of him.⁵⁰ No less a person than Roger Williams, the founder of the Rhode Island colony, as early as 1655 strikingly illustrated the relation of religion to the various offenses. He compared the state with a ship carrying a crew and many passengers of diverse faiths and stated that all the liberty of conscience turns upon these two hinges. "1. that no one be forced to attend the ship's prayers or prevented from attending prayers of his own. 2. that if either refuse to obey the laws and orders of the vessel concerning its preservation and the common peace, or mutiny, or maintain that

⁴⁷ 1886, *Matter of Frazee*, 63 Mich. 396, 405; 30 N. W. 72; 6 Am. St. Rep. 310.

⁴⁸ 1867, *Frolickstein v. Mobile*, 40 Ala. 725.

⁴⁹ 1904, *State v. Chenoweth*, 163 Ind. 94, 99; 71 N. E. 197.

⁵⁰ 1854, *Donahue v. Richards*, 38 Me. 379; 61 Am. Dec. 256.

there should be no superior, that the commander in such case shall judge, resist, compel and punish such transgressor according to his deserts and merits."⁵¹ A clergyman will therefore not be allowed by nasty and obscene language under the guise of rebuking sin to commit a breach of the peace. He has the right to propagate his religious views but must in so doing remain within the law.⁵² Nor will the state by scruples claimed to be religious be prevented from enacting and enforcing proper police regulations. It may exclude alien anarchists from its borders,⁵³ may forbid the sale of articles to prevent 'pregnancy'⁵⁴ or of any meat falsely labeled to be kosher⁵⁵ may exact a physical examination from school children,⁵⁶ may require male persons making application for a marriage license to file a doctor's certificate with the county clerk certifying that they are free from acquired venereal diseases⁵⁷ without in the least trenching upon religious liberty. In a case arising in a southern state at the outbreak of the civil war colored people were even required to form a congregation only in connection with some white congregation.⁵⁸

Religious pretensions have occasionally been used to cover up fraudulent schemes of the grossest nature. It need hardly be stated that the religious veneer of such plots will not protect their perpetrators against the restrictive action of the state. Equity delights to brush away the barricades of formal documents, receipts and papers procured by means of false revelations and promises, and to administer the law that he who sows is entitled to reap.⁵⁹ A person may not therefore pretend to possess the power of driving out evil spirits⁶⁰ nor by slight of hand performances create the impression that he is gifted with miraculous power⁶¹ and thus induce ignorant persons to pay him money for pretended services. The fact that he is an ordained minister of the "National Astrological Society" and claims that fortune telling is a part of his religion will not protect him from a vagrancy charge.⁶² If his religious convictions sanction

⁵¹ Rhode Island Historical Society 4, page 241. Cited 32 Am. Law Rev. 529, 530.

⁵² 1915, *Delk v. Commonwealth*, 166 Ky. 39; 178 S. W. 1129.

⁵³ 1904, *Turner v. Williams*, 194 U. S. 279, 292; 48 L. Ed. 979; 24 Sup. Ct. Rep. 719; affirming 126 Fed. 253.

⁵⁴ 1916, *People v. Byrne*, 161 N. Y. Supp. 680.

⁵⁵ 1916, *People v. Goldberger*, 163 N. Y. Supp. 663.

⁵⁶ 1914, *Streich v. Board of Education*, 34 S. D. 169; 147 N. W. 779.

⁵⁷ 1914, *Peterson v. Widule*, 157 Wis. 641; 147 N. W. 966; 52 L. R. A. (N. S.) 778.

⁵⁸ 1860, *African M. E. Church v. New Orleans*, 15 La. Ann. 441.

⁵⁹ 1866, *Scott v. Thompson*, 21 Iowa 599.

⁶⁰ 1904, *State v. Durham*, 21 Del. (5 Penn.) 105; 58 Atl. 1024.

⁶¹ 1876, *Bowen v. State*, 68 Tenn. (9 Baxt.) 45; 40 Am. Rep. 71.

⁶² 1912, *State v. Neitzel*, 69 Wash. 567; 125 Pac. 939.

such practices, the law will not sanction such religious convictions, but will take measures to guard against their baneful consequences.

It is well known that the Chinese bury their deceased kinfolks in China no matter where they may have died. This custom rests on a religious basis and leads not only to shipments of the remains of recently deceased Orientals across the Pacific but also to the disinterment of such remains, sometimes after a long period of interment. That such action may be harmful to the public health and hence is a proper subject of regulation cannot be doubted. It has therefore been held that a statute forbidding the exhumation of a body except under a license from the board of health and fixing a fee of ten dollars for such license does not conflict with the Burlingame treaty which provides that "Chinese subjects of the United States shall enjoy entire liberty of conscience and shall be free from all disabilities or persecutions on account of their religious faith or worship."⁶³

One other inherent limitation of the term religious liberty must be noticed. The rights of one denomination end where those of another begin. Any other arrangement would inevitably lead to a preference of one denomination over another and would "end in simple intolerance of all not in accord with the sentiments of the particular sect."⁶⁴ The religious rights of any person cannot therefore "be so extended as to interfere with the exercise of similar rights by other persons."⁶⁵ The individual holds his religious faith and all his ideas, notions and preferences in reasonable subserviency to the equal rights of others and to the paramount interest of the public.⁶⁶ Says the United States Supreme Court:

"The full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."⁶⁷

It will now be clear that the relation between law and religion is very simple. The greatest and freest scope is allowed to religious practices which are only checked where they come into conflict with

⁶³ 1880, *In re Wong Yung Quy*, 6 Sawyer 442, 450; 2 Fed. 624, 632.

⁶⁴ 1898, *State v. Powell*, 58 Ohio St. 324, 341; 50 N. E. 900; 41 L. R. A. 854.

⁶⁵ 1890, *State ex rel Weiss v. District Board*, 76 Wis. 177; 44 N. W. 967; 7 L. R. A. 330; 20 Am. St. Rep. 41.

⁶⁶ 1876, *Ferritur v. Tyler*, 48 Vt. 444, 467.

⁶⁷ 1871, *Watson v. Jones*, 80 U. S. (13 Wall.) 679, 728; 20 L. Ed. 666.

the public peace or the rights of others, in short, with the obligations of good citizenship.⁶⁸ The law however is and remains supreme in every case. "The decrees of a council or the decision of the Ulema are alike powerless before its will. It acknowledges no government external to itself."⁶⁹ While judicial cognizance is taken of historical facts connected with the various churches,⁷⁰ while the general meaning of denominational terms,⁷¹ and the fact that churches keep records⁷² is judicially noticed, a public statute cannot be superseded by any church discipline.⁷³ It is superior to any pretensions set up by a bishop under the canons of his church.⁷⁴ It follows that "so far as the canons of the church are in conflict with the law of the land, they must yield to the latter; but when they do not so conflict they must prevail."⁷⁵

Before enlarging upon the protection given to mere opinion it will be well to discuss certain acts which are restrained by the state, though they are prompted by a religious motive. In defining these acts the fact that the prevailing religion in this country is Christian cannot but exercise a potent influence. Since the great body of the American people are Christian in sentiment, our laws and institutions "must necessarily be based upon and embody the teachings of the redeemer of mankind."⁷⁶ It has therefore been said that the spirit of Christianity has infused itself into and has humanized our law,⁷⁷ has been interwoven with the web and woof of the state government,⁷⁸ is regarded as the parent of good government, the sun which gives to government all its true light,⁷⁹ and enters "in no small degree into the ascertainment of social duties."⁸⁰ Christianity is indeed the alpha and omega of our moral law and the power which directs the operation of our judicial system. It underlies the

⁶⁸ 1913, *In re Opinion of the Justices*, 214 Mass. 599, 601; 102 N. E. 464.

⁶⁹ 1854, *Donohue v. Richards*, 38 Me. 379, 410; 61 Am. Dec. 256.

⁷⁰ 1896, *Smith v. Pedigo*, 145 Ind. 361, 418; 33 N. E. 777; 44 N. E. 363; 19 L. R. A. 433; 32 L. R. A. 838.

⁷¹ 1859, *Attorney General v. Dublin*, 38 N. H. 459, 513.

⁷² 1831, *Sawyer v. Baldwin*, 28 Mass. (11 Pick.) 492.

⁷³ 1910, *Presbytery of New York v. Westminster Presbyterian Church*, 122 N. Y. Supp. 309; 1893, *In re Third Methodist Episcopal Church*, 67 Hun. 86; 21 N. Y. Supp. 1105; 51 N. Y. St. Rep. 406; affirmed 142 N. Y. 638.

⁷⁴ 1908, *Krauzman v. Hoban*, 221 Pa. 213; 70 Atl. 740.

⁷⁵ 1913, *Ryan v. Dunsilla*, 239 Pa. 486; 86 Atl. 1089; 1884, *McCravy v. McFarland*, 93 Ind. 466; 1892, *Bartlett v. Hopkins*, 76 Md. 5; 23 Atl. 1089; 24 Atl. 532; 1894, *Krecker v. Shirey*, 163 Pa. 534; 30 Atl. 440; 29 L. R. A. 476.

⁷⁶ 1883, *Richmond v. Moore*, 107 Ill. 429, 435.

⁷⁷ 1858, Field J. dissenting in *Ex parte Newman*, 9 Cal. 502, 523, 524.

⁷⁸ 1908, *Church v. Bullock*, 109 S. W. 115, 118; 16 L. R. A. (N. S.) 860 (Tex.).

⁷⁹ 1877, *Board of Education v. Minor*, 23 Ohio St. 211, 249, 13 Am. Rep. 233.

⁸⁰ 1870, *Goodrich v. Goodrich*, 44 Ala. 670, 673.

whole administration of the government, State or National, enters into its laws and is applicable to all because it embodies those essentials of religious faith which are broad enough to include all believers. It is, however, not Christianity with the spiritual artillery of European countries, not Christianity "founded on any particular religious tenets; not Christianity with an established church, and tithes and spiritual courts; but Christianity with liberty of conscience to all men"⁸¹ that is thus effective. It follows that certain acts which would be deemed to be indifferent or even praiseworthy in a pagan country are punished as crimes or misdemeanors in America. This of course is not done "for the purpose of propping up the Christian religion but because those breaches are offenses against the laws of the state."⁸² At least half of the ten commandments are on the statute books in one form or another. These facts have led to the formulation of the maxim that "Christianity is a part of the law of the land." This principle as announced by such eminent English judges as Holt and Mansfield,⁸³ has received extensive discussion in legal journals,⁸⁴ has indeed been flatly rejected by the Ohio court⁸⁵ and has been branded by Thomas Jefferson as a "judicial forgery" which "engulfed bible testament and all into the common law."⁸⁶

It is respectfully submitted that Jefferson has entirely misunderstood the scope of this maxim. It does not refer to any established church. "Christianity is not the legal religion of the state as established by law. If it were it would be a civil or political institution which it is not; but this is not inconsistent with the idea that it is in fact and ever has been the religion of the people. This fact is everywhere prominent in all our civil and political history and has been from the first recognized and acted upon by the people as well as by constitutional conventions, by legislatures and by courts of justice."⁸⁷ We are not a nation without religion but we are a nation free from ecclesiastical despotism. We are not a nation without churches but we are a nation of free churches. We are not a nation with civil sanctions for ecclesiastical dominations but we are a nation which subjects all ecclesiastical organizations to the civil

⁸¹ 1824, *Updegraph v. Commonwealth*, 11 S. & R. 394, 400 (Pa.).

⁸² 1810, *Barnes v. First Parish of Falmouth*, 6 Mass. 401, 410.

⁸³ For English cases see Note in 30 Ann. Cas. 1227.

⁸⁴ See 65 Alb. L. J. 113; 9 Am. Jur. 346; 29 Am. L. R. (N. S.) 273; 32 Am. Law Rev. 529; 18 Case and Comment 461; 2 Intercol. L. J. 229.

⁸⁵ 1853, *Bloom v. Richards*, 2 Ohio St. 387, 390

⁸⁶ Letter of June 5, 1824, Jefferson's Posthumous Works, Vol. 4, cited and discussed 1837, *State v. Chandler*, 2 Del. 558. For a criticism of this dictum see 9 Am. Jurist. 346.

⁸⁷ 1861, *Lindenmueller v. People*, 33 Barb. 548, 561 (N. Y.).

authorities. We are not a nation whose Christianity is filtered through intolerant ecclesiastical bodies but we are a nation whose Christianity flows freely from the hearts of a great and free people. Says Daniel Webster in his memorable argument in the *Girard Will* case:

"The massive cathedral of the Catholic; the Episcopalian church with its lofty spire pointing heavenward; the plain temple of the Quaker; the log church of the hardy pioneer of the wilderness; the mementos and memorials around and about us; the consecrated graveyards; their tombstones and epitaphs; their silent vaults, their mouldering contents, all attest it. The dead prove it as well as the living. The generations that are gone before speak it and pronounce it from the tomb. We feel it. All proclaim that Christianity, general tolerant Christianity, Christianity independent of sects and parties, that Christianity to which the sword and fagot are unknown, general tolerant Christianity, is the law of the land."⁸⁸

This situation is a natural result of our growth as a nation. Among the colonists from Maine to Georgia, from the Mayflower to the Dutch merchantmen, from the Puritans of Cape Cod to the Catholics of Maryland there were no Brahmins, Buddists or Hindoos, no Turkish Mohammedans, Fire Worshippers or Pagan idolators. The founders of our country on the contrary were Christians not Pagans, Republicans not Monarchists, and consequently they established not a pagan monarchy but a Christian republic. The states and the nation are therefore not divorced from but actually founded on the Christian religion. Christianity lies at the foundation of the various state constitutions and on it rest many of the principles and usages constantly acknowledged and enforced in the courts.⁸⁹ It lies back of the churches, the states, the nation, in the heart of the people, the common source of church, state, and nation. It is the direct gift of God not mediately through the "spiritual artillery" of European countries but immediately through his own word and spirit. It cannot therefore be enforced by *mandamus* or *injunction*, by roaring cannon or bristling bayonets, by the lawyer's tongue or the policeman's club. It is no more subject to the action of Synods, Conventions, Assemblies and Conferences than it is to the acts of Congress, the statutes of the state legislatures, the or-

⁸⁸ Works of Daniel Webster, Vol. 6, page 176. Cited 10 Mich. Law Rev. 176.

⁸⁹ 1846, *Charleston v. Benjamin*, 2 Strob. Law 508, 521 (S. C.).

dinances of city councils and the resolutions of county boards. Says the New York Supreme Court:

"It would be strange that a people, Christian in doctrine and worship, many of whom, or whose forefathers had sought these shores for the privilege of worshipping God in simplicity and purity of faith, and who regarded religion as the basis of their civil liberty, and the foundation of their rights, should, in their zeal to secure to all the freedom of conscience which they valued so highly, solemnly repudiate and put beyond the pale of the law, the religion which was dear to them as life, and dethrone the God, who, they openly and avowedly professed to believe, had been their protector and guide as a people."^{89a}

There is nothing incongruous in this situation. A civil government which avails itself only of its own powers is extremely defective and unless it derives assistance from some superior power whose laws extend to the temper and disposition of the human heart and before whom no offence is secret, the state of man under any civil constitution would be wretched indeed. The teaching of a system of correct morals and the formation and cultivation of reasonable and just habits and manners protects every man's person and property from outrage, promotes and multiplies his personal and social enjoyments and gives him more solid and permanent advantages than the mere administration of the law courts can achieve. Though Christ the founder of the Christian religion did not intend to erect a temporal dominion but to reign in the hearts of men by subduing their irregular appetites and propensities and by moulding their passions to the noblest purposes, though he did not make any pretense to worldly pomp and power, his religion is calculated and accommodated to meliorate the conduct and condition of man under any form of civil government.⁹⁰ The services of religion to the state indeed are of untold value.⁹¹ To it we are indebted for all social order and happiness. Civil and religious liberty are due to it.⁹²

This situation is not in any manner inconsistent with the great American doctrine concerning the separation of state and church. A distinction must be made between a religion preferred by law and a religion preferred by the people without the coercion of the law,

^{89a} 1861, *Lindenmueller v. People*, 33 Barb. 548, 561, 562.

⁹⁰ 1810, *Barnes v. Falmouth*, 6 Mass. 401, 409, 410.

⁹¹ 1891, *Atlanta v. Church*, 86 Ga. 730, 744; 13 S. E. 252; 12 L. R. A. 852.

⁹² 1831, *Commonwealth v. Depuy*, Brightly N. P. 44 47 (Pa.).

between a legal establishment and a religious creed freely chosen by the people themselves.⁹³ In this sense our nation and the states composing it are Christian in policy to the extent of embracing and adopting the moral tenets of Christianity as furnishing a sound basis upon which the moral obligations of the citizens to society and the state may be established.¹ The law can raise no higher standard of morals for the government of the individual than society itself in the aggregate has attained.⁹⁴ "The declaration that Christianity is part of the law of the land is a summary description of an existing and very obvious condition of our institutions. We are a Christian people, in so far as we have entered into the spirit of Christian institutions, and become imbued with the sentiments and principles of Christianity; and we cannot be imbued with them and yet prevent them from entering into and influencing, more or less, all our social institutions, customs and relations, as well as our individual modes of thinking and acting. It is involved in our social nature, that even those among us who reject Christianity, cannot possibly get clear of its influence, or reject those sentiments, customs and principles which it has spread among the people; so that, like the air we breathe, they have become the common stock of the whole country, and essential elements of its life."⁹⁵ In the words of the United States Supreme Court, Christianity is part of the common law in "this qualified sense that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against to the annoyance of believers or the injury of the public."⁹⁶

It must of course not be supposed that every command of the Bible will be enforced by the civil power. No court will punish a man because he does not love his neighbor as much as himself or because he refuses to do to others what he would have others do to him. Such commands are too sublime to be enforced by a mundane tribunal. The law does not light the fires of Smithfield on the one hand nor prefer the doctrines of infidelity on the other. It adapts itself to the religion of the country just as far as is necessary for the peace and safety of its civil institutions and takes cognizance of offences against God only when by their inevitable effects they become offenses against man and his temporal security.⁹⁷ Punishment

⁹³ 1837, *State v. Chandler*, 2 Del. (2 Har.) 553.

⁹⁴ 1908, *District of Columbia v. Robinson*, 30 App. D. C. 283. See note 30 Ann. Cas. 1227.

⁹⁵ 1855, *Mohney v. Cook*, 26 Pa. 342, 347; 67 Am. Dec. 419.

⁹⁶ 1844, *Vidal v. Girard*, 43 U. S. (2 How.) 127, 198; 11 L. Ed. 205.

⁹⁷ 1837, *State v. Chandler*, 2 Del. (2 Har.) 553.

is therefore inflicted "not for the purpose of propping up the Christian religion, but because these breaches are offences against the laws of the state."⁹⁸ If the prevailing religion of the country was Jewish or Mohammedan a similar recognition would be accorded to it. Some acts now deemed to be criminal would in that case become innocuous and *vice versa*.

The real meaning of the maxim must now be clear. Christianity is a part of the law in the same sense in which the almanac or parliamentary law are said to be part of it. Courts will therefore recognize the maxim⁹⁹ even in the construction of statutes,¹⁰⁰ public and private contracts¹⁰¹ and wills.¹⁰² The principle that Christianity is a part of the law of the land, the cement and foundation of all our institutions¹⁰³ has therefore been vigorously asserted by the courts in cases arising out of prosecutions for blasphemy,¹⁰⁴ obscenity,¹⁰⁵ violations of the Sunday laws,¹⁰⁶ and disturbance of religious meetings,¹⁰⁷ and out of private litigation involving Sunday contracts,¹⁰⁸ slander,¹⁰⁹ mechanics liens¹¹⁰ and actions for a divorce.¹¹¹ A denial of the maxim has been designated as "barren

⁹⁸ 1810, *Barnes v. Falmouth*, 6 Mass. 401, 410.

⁹⁹ 1872, *Board of Education v. Minor*, 23 Ohio St. 211; 13 Am. Rep. 233.

¹⁰⁰ 1892, *Holy Trinity Church v. United States*, 143 U. S. 457; 36 L. Ed. 226; 12 Sup. Ct. Rep. 511.

¹⁰¹ 1918, *De Hasque v. Atchison Railway Co.*, 173 Pac. 73 (Okl.); 1830, *Reformed Church v. Veeder*, 4 Wend. 494, 496 (N. Y.).

¹⁰² 1871, *Grimes v. Harmon*, 35 Ind. 198, 211; 9 Am. Rep. 690; 1870, *Zeisweiss v. James*, 63 Pa. 465, 471; 3 Am. Rep. 558; see 1881, *Simpson v. Welcome*, 72 Me. 496, 499; 39 Am. Rep. 349.

¹⁰³ 1843, *Commonwealth v. Sigman*, 2 Clark 36, 43; 3 Pa. Law J. 252, 259 (Pa.).

¹⁰⁴ 1837, *State v. Chandler*, 2 Del. (2 Har.) 553; 1834, *Commonwealth v. Kneeland*, *Thatchers Cri. Cas.* 346; affirmed 37 Mass. 206; 1811, *People v. Ruggles*, 8 Johns. 290 (N. Y.); 1824, *Updegraff v. Commonwealth*, 11 S. & R. 394 (Pa.).

¹⁰⁵ 1851, *Bell v. State*, 31 Tenn. (1 Swan) 42, 44; 1909, *Knowles v. United States*, 170 Fed. 409; 95 C. C. A. 579.

¹⁰⁶ 1850, *Shover v. State*, 10 Ark. 259, 263; 1908, *District of Columbia v. Robinson*, 30 App. D. C. 283; 1879, *State v. Bott*, 31 La. Ann. 663, 665; 33 Am. Rep. 224; 1854, *State v. Ambs*, 20 Mo. 214; 1861, *Lindenmueller v. People*, 33 Barb. 548, 560; 1911, *State v. Barnes*, 22 N. D. 18; 132 N. W. 215; 1867, *Sparhawk v. Union Pacific Ry. Co.*, 54 Pa. 401, 406; 1846, *Charleston v. Benjamin*, 2 Strob. Law 508, 524; 49 Am. Dec. 608; but see 1898, *State v. Petit*, 74 Minn. 376; 77 N. W. 225; affirmed 177 U. S. 164; 44 L. Ed. 716; 20 Sup. Ct. Rep. 666.

¹⁰⁷ 1843, *Commonwealth v. Sigman*, 2 Clark 36; 3 Pa. Law J. 252, 256 (Pa.); 1907, *Taylor v. State*, 1 Ga. App. 539; 57 S. E. 1049.

¹⁰⁸ 1883, *Richmond v. Monroe*, 107 Ill. 429; 1860, *Melvin v. Easley*, 52 N. C. 356, 369; 1855, *Mohney v. Cook*, 26 Pa. 342; 67 Am. Dec. 419; 1869, *Granger v. Grubb*, 7 Phila. 350, 355 (Pa.). Contra 1853, *Bloom v. Richards*, 2 Ohio St. 387, 390. See also 1872, *Board of Education v. Minor*, 23 Ohio St. 211; 13 Am. Rep. 233.

¹⁰⁹ 1816, *Chapman v. Gillett*, 2 Conn. 40, 51, 63; 1829, *Harvey v. Boies*, 1 Penrose and Watts 12 (Pa.).

¹¹⁰ 1846, *Beam v. First M. E. Church*, 3 Clark 343 (Pa.).

¹¹¹ 1870, *Goodrich v. Goodrich*, 44 Ala. 670, 673.

soil upon which no flower ever bloomed."¹¹² It has been used to sustain the contention that the Bible may be read in the public schools.¹¹³ Courts therefore take judicial notice of Christianity¹¹⁴ and have even stated that our school laws are based on the Christian religion.¹¹⁵

Nor is such recognition of religion confined to the courts. While the constitutions of Delaware, New Hampshire, Oregon, Tennessee, Vermont and West Virginia either contain no preamble or no reference to God in their preamble, all the other existing state constitutions express in their preamble a gratitude toward God,¹¹⁶ designating him as Allmighty God,¹¹⁷ the Supreme Being,¹¹⁸ the Sovereign Ruler of Nations, the Supreme Ruler of the Universe.¹¹⁹ Others not satisfied with so simple a tribute rely and depend upon him for protection,¹²⁰ invoke his blessing,¹²¹ guidance,¹²² favor,¹²³ aid and direction,¹²⁴ express a profound reverence for the Supreme Ruler of the Universe,¹²⁵ and acknowledge with grateful hearts their dependence upon him, his good providence,¹²⁶ the goodness of the Supreme Sovereign Ruler,¹²⁷ the Great Legislator¹²⁸ of the Universe. While the United States constitution contains no similar reference to God it is dated as of the year of "our lord" 1787.^{128a} Similarly the Declaration of Independence refers to nature's God as the creator of all men, appeals to him as the Supreme Judge of the world and relies on the protection of his divine providence. Nor

¹¹² 1824, *Updegrah v. Commonwealth*, 11 S. and R. 394 (Pa.).

¹¹³ 1908, *Church v. Bullock*, 109 S. W. 115; 16 L. R. A. (N. S.) 860 (Tex.). See 1890, *State ex rel Weiss v. District Board*, 76 Wis. 177; 44 N. W. 967; 7 L. R. A. 330; 20 Am. St. Rep. 41.

¹¹⁴ 1902, *Hilton v. Roylance*, 25 Utah 129; 68 Pac. 660; 58 L. R. A. 723.

¹¹⁵ 1854, *First Congregational Society v. Atwater*, 23 Conn. 34, 42.

¹¹⁶ Minnesota, South Carolina, Virginia and Wyoming constitutions.

¹¹⁷ Alabama, Arizona, Arkansas, California, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Texas, Utah and Wisconsin constitutions.

¹¹⁸ Iowa constitution.

¹¹⁹ North Carolina and Washington constitutions.

¹²⁰ Georgia and Iowa constitutions.

¹²¹ Illinois, Kentucky, Mississippi, New Jersey, Rhode Island, Texas and Virginia constitutions.

¹²² Alabama, Georgia, Oklahoma and Pennsylvania constitutions.

¹²³ Alabama constitution.

¹²⁴ Maine and Massachusetts constitutions.

¹²⁵ Colorado and Missouri constitutions.

¹²⁶ Connecticut and North Carolina constitutions.

¹²⁷ Maine and Missouri constitutions.

¹²⁸ Massachusetts constitution.

^{128a} For an explanation of the meaning of this phrase see 1854 *State v. Ambs*, 20 Mo. 214, 217; 1911 *State v. Barnes*, 22 N. D. 18, 27, 132 N. W. 215.

is such acknowledgment to be found only in documents, however venerable, but penetrates into the every day life of every citizen. The oath administered daily throughout the length and breadth of the country to witnesses in and out of the courts of justice and to officers from the president down concludes with the words "so help me God." Our national coins from the humble Lincoln cent to the proud double eagle contain the words "in God we trust." And our national hymn acknowledges our father's great God as our king and as the author of our liberty and prays for his protection. The only flag that ever waves above the stars and stripes on board of the various units of our fleet is the church pennant with the cross in its center.

The Great War has served to bring the close connection between the government and religion into the foreground. The president has repeatedly called on the various churches to hold services paying especial attention to the emergencies created by the war. A well known poster on display in private and in government buildings has admonished the citizens to "give a minute to God in silent prayer at noon for those who fight and serve over there and over here" and "to pause a minute every day at noon and pray for victory for our nation and our allies." Americans have sung the Star Spangled Banner ever since it was written in 1814 but have quite generally paid no further attention to their own flag. They have now learned to regard their national standard with respect and veneration and with it have grasped the fact that its red, white and blue colors are not an historical accident but sink their roots deep into the ages. Says Charles W. Stewart, Superintendent of Naval Records and Librarian of the United States Navy Department:

"The flag may trace its ancestry back to Mount Sinai whence the Lord gave to Moses the Ten Commandments and the book of the Law, which testify of God's will and man's duty, and were deposited in the Arc of the Covenant within the Tabernacle whose curtains were blue, purple, scarlet and fine twined linen.

Before the Ark stood the table of shew breads, with its cloth of blue, scarlet and white. These colors of the Jewish church were taken over by the early Western Church for its own and given to all the nations of western Europe for their flags. When the United States chose their flag it was of the colors of old, but new in arrangement and design."^{128b}

^{128b} National Geographic Magazine, 1817, p. 303.

But perhaps the most conclusive proof brought into the foreground by the mobilization of the fighting strength of our country is to be found in the various devices which distinguish the various branches of our military and naval establishments. These are on the whole distinctly emblematic of the Christian religion. The Roman cross worn on the collars of the army and navy chaplains has become a familiar sight wherever soldiers, marines or sailors are gathered in large numbers. The Geneva cross of the American Red Cross Society as displayed on its flags and buttons is familiar to all and is worn not only on the cap, the shoulder-strap and the sleeve of its representatives but is also a part of the insignia of the baymen, surgical nurses, hospital corps, pharmacists mates and officers of the public health service. This display of the emblem of Christianity however is not at all peculiar to the religious and charitable auxiliaries of our armed forces but is the outstanding characteristic of its very fighting branches and their liaison agent. Officers and enlisted men of the infantry, cavalry, artillery and signal corps therefore wear a representation of crossed rifles, sabres, cannon and signal flags respectively. Similarly the cap devices of all naval officers, commissioned or warrant, in active service or in reserve consist in whole or in part of a representation of crossed anchors. Nor are the great organizations which perform the clerical and mechanical work so essential in an army an exception. The insignia of the quartermaster's, judge advocate's, inspector general's and paymaster's corps all contain a representation of a sword crossed respectively by a key, a pen, a mace and a penholder. Even smaller groups show the same tendency. Crossed retorts designate chemists, crossed wrenches station engineers, crossed drumsticks drummers, crossed pens yeomen and clerks, crossed oars keepers and surfmen, crossed axes yardmen and carpenters, crossed keys storekeepers and shipkeepers, crossed anchors boatswains, boatswain's mates and masters mates and crossed hammers blacksmiths, shipfitters, mechanics, artificers and chief mechanics of artillery. In addition crossed hammers and pens designate the service schools, crossed poles and anchors the public health service and crossed arrows and anchors coxwains.

The most significant of all military emblems however are the insignia of the medical men and women of the army whether they are nurses, surgeons, dentists, pharmacists, ambulance men hospital attendants, veterinary surgeons or sanitary troops. It is clear that the outstanding characteristic of these insignia is a pole encircled by two serpents. This recalls to mind the story of the attack on

the children of Israel by fiery serpents and the remedy devised by Moses in the form of a brass serpent placed on a pole whose sight worked a cure of those suffering from snake bite.^{128d} It also recalls the interpretation placed upon this story by no less a person than Christ himself when he said: "As Moses lifted up the serpent in the wilderness, even so must the Son of Man be lifted up that whosoever believeth in him should not perish but have eternal life"^{128e} and is the finest and most delicate tribute which can be paid by any emblem to the Christian religion and its founder.

The consequences of this situation stand out clearly and well defined. "No principle of constitutional law is violated when thanksgiving or fast days are appointed; when chaplains are designated for the army and navy; when legislative sessions are opened with prayer or the reading of the Scriptures."¹²⁹ Nonsectarian prayers offered by Protestant and Catholic clergymen at a public school graduation exercise have therefore been held not to offend against the constitution.¹³⁰ A charity with a county as trustee has been upheld though chapel exercises were provided for.¹³¹ While the constitutions of Michigan and Oregon provide that "no money shall be appropriated for the payment of any religious services in either house of the legislature,"¹³² the constitution of Michigan expressly stipulates that "the legislature may authorize the employment of a chaplain for each of the state prisons,"¹³³ while the Washington constitution lays it down that its provision in regard to appropriations "shall not be so construed as to forbid the employment by the state of a chaplain for the state penitentiary, and for such of the state reformatories as in the discretion of the legislature may seem justified."¹³⁴

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(To be continued.)

^{128d} Numbers 21, 9.

^{128e} John 3, 14, 15.

¹²⁹ Cooley, *Constitutional Limitations*, 6th edition, 578; 1908, *Church v. Bullock*, 109 S. W. 115, 118; 16 L. R. A. (N. S.) 860 (Tex.).

¹³⁰ 1916, *State v. District Board*, 162 Wis. 482; 156 N. W. 477, 481.

¹³¹ 1894, *Rush County v. Dinwidie*, 139 Ind. 128, 137, 138; 37 N. E. 795.

¹³² Michigan Const. of 1908, Art. 5, Sec. 26; Oregon Const. of 1857, Art. 1, Sec. 5.

¹³³ Michigan Const. of 1908, Art. 5, Sec. 26.

¹³⁴ Washington Const. of 1889, Art. 1, Sec. 11.